

**Advisory Action  
Before the Filing of an Appeal Brief**

**Application No.**

10/524,957

**Applicant(s)**

PETROSENKO ET AL.

**Examiner**

MELANIE J. HAND

**Art Unit**

3761

***--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --***

THE REPLY FILED 01 October 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.  
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.  
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: 1-7, 9-16, 19, 23-25 and 27-29.  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.

/Melanie J Hand/  
Primary Examiner, Art Unit 3761

Continuation of 11, does NOT place the application in condition for allowance because:

1. Applicant's arguments filed October 1, 2009 have been fully considered but they are not persuasive. With respect to arguments regarding claim 1: Applicant argues that Lockwood does not disclose passageways formed in the wound dressing member between the port and the holes. Applicant is directed to Fig. 27 of Lockwood which is the embodiment cited against claim 1. The wound dressing member 222 is identical to the wound dressing member 22 referred to by applicant in terms of a series of passageways e.g. 30, 32 that terminate in holes 28. The passageways are thus formed in dressing member 222 and extend between the port 26 (or 23 in Fig. 27) and the holes 28. Applicant's statement regarding insert 219 including member 222 may be correct with respect to other embodiments but are not correct with respect to Fig. 27. Applicant also argues that the limitation "to engage healthy skin..." is not a functional limitation. Applicant cites the BPAI's holding in Ex Parte Boudry in support of the argument that examiner's statement that the wound dressing member is fully functional to engage healthy skin is not sufficient for a rejection under 35 U.S.C. 102. The case law is irrelevant because it pertains to a "configured to" limitation which is not functional language, whereas the "to engage healthy skin" limitation is, and the fact that the wound dressing member meets all of the structural limitations of claim 1 and is thus fully functional to engage healthy skin is sufficient for a rejection under 35 U.S.C. 102.

2. With respect to arguments regarding claim 12, as applicant; correctly cites, the tube 13 of Lockwood may be molded or attached to the wound dressing member. This disclosure encompasses an embodiment in which the wound dressing (thin flexible member) 222 is separate and spaced from the tube 13. As to the argument that Lockwood does not disclose bores through the body extending from one side surface to the other, this argument was previously addressed in the final Office action and it is clear from Figs. 4 and 5 of Lockwood that Lockwood discloses such passageways. As to the argument that Lockwood does not disclose a solid top surface and solid bottom surface, these limitations are interpreted in light of the specification. A body which has a single passageway through the body necessarily interrupts the continuous surface of the body at the top surface and bottom. Thus, as in the case of the Lockwood insert 219, the body necessarily has a solid top surface and solid bottom surface because the body is a cylinder which does not have a single passageway as claimed that would interrupt the continuous surfaces at the top and bottom, and those surfaces would therefore necessarily be solid. Applicant is also reminded that the limitations of a top and bottom solid surface and a single passageway are recited in alternative form, thus Lockwood need only disclose one of those limitations.

3. Applicant's arguments with regard to dependent claims 7, 11, 15, 28 and 29 have been fully considered but are not persuasive, as applicant's arguments depend entirely on arguments regarding the rejection of claims 1 and 13, which have been addressed supra. As to the additional argument that there would be no motivation to use the Gibertoni device with the Lockwood device, examiner disagrees that the Gibertoni device would interfere with the vacuum drainage. As in any absorbent article constructed so as to effect capillary fluid movement, such movement can occur with or without vacuum drainage and the magnitude of pressure and flow involved in capillary flow is too small to interfere in any way with vacuum drainage due to the large disparity in pressure differences in capillary versus vacuum-assisted flow.

4. Applicant's arguments with regard to dependent claim 10 have been fully considered but are not persuasive, as applicant's arguments depend entirely on arguments regarding the rejection of claim 1, which have been addressed supra.

5. Applicant's arguments with regard to dependent claim 27 have been fully considered but are not persuasive, as applicant's arguments depend entirely on arguments regarding the rejection of claim 27, which have been addressed supra. As to additional arguments that using the Miner device with the Lockwood device would interfere with the function of the Miner device, the drain of Miner is a passive drain, therefore there would be no interference possible with the device of Lockwood because the Miner drain would still be passive, acting as a conduit for the vacuum flow.

6. As no new and persuasive arguments have been presented that overcome the outstanding claim rejections, the reply is not entered.